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THE ADMINISTRATION OF JUSTICE AND HUMAN RIGHTS

Report of the sessional working group on the administration of justice

Chairman-Rapporteur: Mr. Yozo Yokota

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Introduction

1. In accordance with the decision taken by the Sub-Commission on 1 August 2000, a sessional working group of the Sub-Commission on the administration of justice was established. It held its first meeting on 3 August 2000. The following experts were appointed members of the working group on 1 August 2000: Mr. Héctor Fix-Zamudio (Latin America), Ms. Françoise Hampson (Western European and other States), Mr. Stanislav Ogurtsov (Eastern Europe), Mr. Yozo Yokota (Asia) and Ms. Leïla Zerrougui (Africa).

2. The following members of the Sub-Commission not members of the working group also took part in the discussions: Mr. Miguel Alfonso Martínez, Mr. Asbjørn Eide, Mr. El-Hadji Guissé, Mr. Louis Joinet, Mr. Manuel Rodríguez-Cuadros, Mr. Yeung Kam Yeung Sik Yuen and Mr. David Weissbrodt.

3. The working group held two public meetings, on 3 and 9 August 2000, and one additional meeting, on 14 August 2000.

4. A representative of the Office of the High Commissioner for Human Rights opened the session of the working group.

5. The working group elected by consensus Mr. Yozo Yokota as Chairman-Rapporteur for its 2000 session.

6. Representatives of the non-governmental organizations War Resisters International, Pax Romana and the International Commission of Jurists made public statements.

7. The working group had before it the following documents relating to its provisional agenda:

Decision 1998/110 of the Sub-Commission;

Report of the sessional working group on the administration of justice on its 1998 session (E/CN.4/Sub.2/1998/19);

Report submitted in 1999 by Mr. Hector Fix-Zamudio, in accordance with Sub-Commission decision 1998/110, on the improvement and efficiency of the judicial instruments for the protection of human rights at the national level and their impact at the international level (E/CN.4/Sub.2/1999/WG.1/CRP.1);

Report submitted in 1999 by Mr. El Hadji Guissé, in accordance with decision 1998/110 to provide the working group with an annual update on the evolution of capital punishment (E/CN.4/Sub.2/2000/WG.1/CRP.1);

Commission on Human Rights resolution 2000/31 on extrajudicial, summary or arbitrary executions;

Commission on Human Rights resolution 2000/65 on the question of the death penalty.

Adoption of the agenda

8. At the first meeting, the working group considered the provisional agenda. It was proposed to amend the provisional agenda by deleting one item and introducing two new items. These proposals were adopted by consensus. At the suggestion of the Chairman-Rapporteur the Working Group decided to adopt the following agenda:

1. Issues related to the deprivation of the right to life, with special reference to:

   (a) Imposition of the death penalty: report of Mr. Guissé

   (b) Summary, arbitrary and other extrajudicial executions.

2. Privatization of prisons: annually updated report of Mr. Alfonso-Martinez.

3. Improvement and efficiency of the judicial instruments for the protection of human rights at the national level and their impact at the international level:

   (a) Consideration of the report of Mr. Fix-Zamudio

   (b) Other:

      (i) Administration of justice through military tribunals and other exceptional jurisdictions;

      (ii) The domestic implementation in practice of the obligation to provide effective domestic remedies.

4. Provisional agenda for the next session.

5. Adoption of the report of the working group to the Sub-Commission.

I. ISSUES RELATED TO THE DEPRIVATION OF THE RIGHT TO LIFE, WITH SPECIAL REFERENCE TO:

A. Imposition of the death penalty: report of Mr. Guissé

9. In accordance with the request made by the working group at the Sub-Commission's fiftieth session and with decision 1998/110 of the Sub-Commission, Mr. Guissé submitted a follow-up report on the evolution of the death penalty. Mr. Guissé reported that apart from Europe, where the use of the death penalty had diminished, not much progress had been made in the abolition of the death penalty elsewhere in the world. The abolitionist trend in Europe

followed the imposition of a long moratorium in European States on executions. According to information provided by Amnesty International and the International Abolitionist Federation, 56 States had abolished the death penalty, 15 States had abolished it except for war crimes, and 27 could be considered abolitionist in fact and in law because within the last 10 years they had not carried out any executions. In 1995, Spain adopted legislation to abolish the death penalty. However, in 97 States the death sentence was still maintained and carried out. Mr Guissé underlined that most of those condemned to death were poor people who could not afford an adequate legal defence and who were therefore victims of legalized crime. He criticized the low level of professional competence and experience of lawyers provided under legal aid schemes in many countries. He referred to practices that would guarantee a fair trial, and therefore encourage the abolition of the death penalty, such as the appointment of qualified counsel by the courts and the abolition of special courts.

10. It was noted that the death penalty had been reinstated in some States. For example, in the United States of America it had been restored in 10 states. Since the majority of persons condemned to death were Black, Mr. Guissé queried whether racial factors had an effect on the imposition of the death penalty.

11. Mr. Guissé rejected any mode of execution and stated that all of them were barbarous. In some countries vulnerable groups, such as minors, pregnant women and the elderly, were not exempted from the death sentence. He called for a prohibition of the death penalty on juveniles under 18, on pregnant women and on women who had a child to feed, and on aged persons. Further, he urged States not to recruit children under 18 into the armed forces, this being an indirect way to subject them to the death penalty.

12. Mr. Guissé called for a wider and stronger abolitionist movement. He stated that the examination of alternative sentences, such as education and rehabilitation measures, should be encouraged.

13. Mr. Sik Yuen stressed that the abolition of the death penalty was a political decision. Mr. Fix-Zamudio stated that owing to public opinion demanding stronger action against criminality, the death sentence had been restored in some Latin American countries. And besides the formal death sentences, people in some rural areas were lynched. Through education and an intense international campaign the population should be persuaded to acknowledge that the imposition of the death penalty and the level of criminality were not linked. Mr. Joinet added that according to the last survey on the question of the death penalty, a majority in France spoke out for the first time against the death penalty and its restoration. Ms. Zerrougui warned that in some regions, owing to spiritual and social resistance, the work of the abolitionist movement should be carried out step by step as the example of Europe had shown. Ms. Hampson rejected the arguments of popular resistance and of electoral popularity. States had the obligation to respect human rights within their jurisdiction and if necessary this had to be done through the education of the population and strong leadership.

14. Ms. Hampson noted that wrongful impositions of the death penalty by courts could lead to the execution of innocent persons. She underlined that a Republican Governor in the United States of America had felt concerned about this risk and had on that basis declared a moratorium.

15. Ms. Hampson criticized the jury selection process in the United States of America. She stated that a ground for disqualification in a capital case was that a person was opposed to the death penalty in principle. This resulted in biased juries. She noted that if a jury was supposed to represent a cross-section of the population of the United States of America, it should not be surprising to find some jury members who were in principle opposed to the death penalty.

16. Ms. Hampson stated that despite the legal obligation of all States - except two - not to execute persons aged under 18, some States occasionally violated that obligation. There was therefore a need to reconfirm this obligation and for States to implement this obligation effectively in their domestic legal system.

17. It was noted that the two States that had not assumed any treaty obligation with regard to the abolition of the death penalty for juveniles under 18 were nonetheless bound by customary international law not to violate this obligation. It was highlighted that when trying to establish the customary international law character of this obligation, it was significant that so many States had accepted this obligation in treaty form. Ms. Hampson argued that the real test as to whether this obligation could be considered as customary international law was to look at the reactions of States and individuals when persons under 18 were executed. She urged her colleagues to put the international customary character of this norm into a resolution and to encourage the Commission on Human Rights to do the same.

18. Mr. Weissbrodt stated that as to the customary international law character of the imposition of the death penalty on juveniles under 18, the two countries that had not ratified the Convention on the Rights of the Child could not use the argument of persistent objector, because their objections had not been persistent. For example, one of these countries had not asserted any objection when it signed the Inter-American Convention on Human Rights nor had it expressed any objection when it signed the International Covenant on Civil and Political Rights. According to international law, in order to be qualified as a persistent objector a State must be persistent at all times. Since this had not been done in the relevant cases, the persistent objector argument was not valid. He urged his colleagues to assert the customary international law character of the norm being discussed.

19. A representative of War Resisters International stated that a right to desert from the army should be recognized and that the Sub-Commission should adopt a resolution in favour of deserters. Since military tribunals and courts of special jurisdiction condemned deserters and others, he supported Mr. Joinet's proposal to examine military tribunals. The representative of Pax Romana criticized the widespread argument connecting the imposition of the death penalty with combating crime and urged the working group to look more carefully into this question. Mr. Joinet remarked that in some circumstances, for example the fight against Nazism, desertion could not be legitimized.

20. Mr. Guissé concluded this item by calling for mobilization for the abolition of the death penalty, investigation into the social background and personality of persons sentenced to death and a search for alternative sentences to the death penalty.

B. Summary, arbitrary and extrajudicial executions

21. Mr. Weissbrodt made a statement with regard to the recent massacres in Kashmir. He said that according to several reports, there had been at least six massacres in Kashmir in the previous three days in which some 100 people had been killed. He highlighted that these killings apparently reflected an attempt by certain armed groups to destroy the chances for dialogue that were emerging following an offer by the largest armed group in Jammu and Kashmir, the Hizbul Mujahideen, to implement an unconditional three-month ceasefire which had been reciprocated by the Government of India. He encouraged the continuance of the peace process in Kashmir so that the violence in Jammu and Kashmir could finally be brought to an end. Ms. Hampson associated herself with that statement.

22. Mr. Guissé noted that summary executions and forced disappearances were taking place in many places in the African continent. He stressed that the United Nations could not accept such acts committed by criminals aspiring to power and positions of authority, and criticized support for the armed bands in the Democratic Republic of the Congo and elsewhere by Western powers, in exchange for diamonds.

II. PRIVATIZATION OF PRISONS: ANNUALLY UPDATED REPORT OF MR. ALFONSO-MARTÍNEZ

23. Mr. Alfonso-Martinez noted that the phenomenon of the privatization of prisons was not limited to one specific country: besides the United States of America, an increasing trend towards the privatization of prisons could be identified in other countries. Mr. Alfonso-Martinez stated that information on the arguments for and against the privatization of prisons was available on various Internet sites.

24. Asked whether the question of private guards for persons confined to health facilities could be considered within future reports, Mr. Alfonso-Martinez said that as he understood his mandate, the information requested by the working group did not include this aspect and was limited to detention and correctional facilities. He would nevertheless be willing to extend the report to such matters if the working group so decided.

25. The working group decided that Mr. Alfonso Martinez should continue to submit an annual updated report, written or oral, on this item.

III. IMPROVEMENT AND EFFICIENCY OF THE JUDICIAL INSTRUMENTS FOR THE PROTECTION OF HUMAN RIGHTS AT THE NATIONAL LEVEL AND THEIR IMPACT AT THE INTERNATIONAL LEVEL:

A. Consideration of the report of Mr. Fix-Zamudio

26. In accordance with the request made by the working group at the Sub-Commission's fiftieth session and with decision 1998/110 of the Sub-Commission, Mr. Fix-Zamudio submitted a report entitled, "improvement and efficiency of the judicial instruments for the protection of human rights at the national level and their impact at the international level: systematic and comprehensive analysis of the various judicial and procedural instruments for the protection of human rights in the domestic sphere" (E/CN.4/Sub.2/1999/WG.1/CRP.1).

27. Mr. Fix-Zamudio explained that the subject had been proposed in view of the importance of domestic instruments in protecting human rights and in the light of the fact that States had the primary obligation to protect these rights. The report examined domestic instruments, notably amparo and habeas corpus, and analysed the impact of domestic legislation in the international sphere. A process of mutual feedback was stressed since domestic legislation had provided models for international conventions while international bodies had also been developing guidelines which also served to enrich national legislation.

28. Domestic instruments were categorized as indirect, complementary or specific. Indirect mechanisms had been created to protect ordinary interests and rights but could also be used to protect certain basic human rights; it was therefore possible to speak of administrative justice where there were no specific remedies for protecting the rights of citizens.

29. Ordinary proceedings, civil, criminal and administrative had two purposes: first, to develop certain fundamental rights of a procedural nature, and second, to allow an ordinary judge (i.e. not a constitutional judge) to settle problems relating to the protection of human rights embodied in the constitution or of international origin. It was highlighted that this aspect was of particular relevance for those countries where Constitutional Courts or Supreme Courts were the final instance for dealing with these instruments.

30. Two other important elements in protecting human rights, although not specifically intended for this purpose, were the facts that public officials who violated fundamental rights were criminally or administratively liable and that States had overall liability for violations of fundamental rights.

31. Lastly, instruments created specifically to protect fundamental rights were considered. The three constituent elements of these instruments were rapid proceedings, precautionary measures and fundamental measures of restitution to compensate victims.

32. Mr. Fix-Zamudio referred to amparo, defined as "protective action", and how it developed in Mexico and other countries as a way of safeguarding individual rights. Similar remedies existed in European countries, in particular in Switzerland, Austria and Germany. He added that amparo could be used both at the first instance - the ordinary level - and at the level of the Supreme/Constitutional Court in those countries where such courts existed.

33. Mr. Fix-Zamudio traced the evolution of the ombudsman institution which began in Scandinavia as a parliamentary commissioner but which was becoming universal. While the Scandinavian model referred only to the defence of the legitimate interests of citizens, in Portugal and in Spain, based on the experience of long dictatorships that had systematically violated the rights of citizens, ombudsmen had taken over the protection of human rights. The ombudsman institutions had no jurisdictional power in Latin American countries. Their extremely important preventive function was noted, however. In those countries ombudsmen actually investigated complaints of human rights violations and tried to find a solution. Usually complaints were settled by conciliation. Investigations were carried out in a very accessible and rapid proceeding that ended in a recommendation. These bodies had done a lot of work in promoting and teaching human rights, and had generated a human rights mentality.

34. Mr. Fix-Zamudio next looked at international law, addressing questions concerning the characteristics it does or should have with regard to the topic under examination. The issues raised concerned the desirable characteristics of remedies and the extent to which it was necessary to exhaust domestic remedies in order to have recourse to international ones. Access to justice at the international and the domestic level was another relevant aspect highlighted in the report, given that many people did not have access, for various cultural, economic and other reasons, to instruments of protection.

35. Several questions were raised, in particular regarding the development of amparo, notably whether the Constitution of any country enunciated the right of amparo and whether the right was applicable before exceptional jurisdictions, including military tribunals.

36. It was noted that the trend of jurisprudence in the Inter-American system and in the Human Rights Committee considered the right to a fair trial and the right to habeas corpus and amparo - at least in some respects - to be non-derogable rights. The Human Rights Committee was currently involved in the redrafting of the general comment on article 4 of the International Covenant on Civil and Political Rights on acceptable limitations to the rights contained in the Covenant.

37. A suggestion was put forward to extend the study on the procedures for the protection of human rights to the pre-trial process: police questioning, conditions of detention at police stations and counselling procedures assisting individuals deprived of liberty.

38. It was proposed that the Sub-Commission send Mr. Fix-Zamudio's report to the Human Rights Committee as it deliberates on derogations.

39. In concluding, Mr. Fix-Zamudio noted that every time there was a situation of emergency in Latin America amparo was suspended, despite the fact that the Inter-American Court in 1987 had considered that habeas corpus and amparo should not be suspended even in time of emergency. He referred to a recent resolution of the Inter-American Court rejecting a sentence of a military tribunal in Peru based on a violation of due process. With regard to the question of

the police, he deplored the fact that habeas corpus writs had been served in some cases with no effect because the police tended to hide people they had detained. He cited a positive evolution and referred to the new criminal reform in Mexico.

B: Other:

1. Administration of justice through military tribunals and other exceptional jurisdictions

40. Mr. Joinet submitted to the Working Group, on his initiative, a working document (E/CN.4/Sub.2/2000/WG.1/CRP.2) regarding the proposal for a working paper on administration of justice through military tribunals and other exceptional jurisdiction.

41. The first part of the study would concentrate on the work done by the United Nations in various forums in which the question of the compatibility of military jurisdiction with international standards had been discussed. The study would then look at international and regional standards, both conventional and extra-conventional, concerning the right to a fair trial, and in particular the right to an effective remedy.

42. The third and the fourth parts of the study would concentrate on what lessons could be drawn from the typology of the various forms of military jurisdiction. The study would examine developments in that regard in various countries from an institutional and historical point of view. The study would also concentrate on the specificities of military jurisdiction in wartime and in peacemaking and peacekeeping operations.

43. The objectives of the study were to enable States to understand better the problem of the administration of justice in military courts and to facilitate the task of special rapporteurs, in particular with regard to the formulation of their recommendations. The essential goal would be to reduce the incompatibility noted between the status of military courts and the international standards analysed in the study.

44. A representative of the International Commission of Jurists underlined the importance of this study with regard to members of the armed forces who were involved in human rights violations and tried by military courts and to civilians tried in military courts. The latter element was emphasized by the Chairman. Mr. Fix- Zamudio stressed that the information provided by this study would enable proposals to be formulated for an international model for military courts.

45. Mr. Rodríguez-Cuadros suggested adding the Basic Principles on the Independence of the Judiciary and the Basic Principles on the Role of Lawyers to the list of references in section II of Mr. Joinet's paper; further, he proposed that in section III, under "Specificities of certain rules of competence", cases in which military tribunals are considered competent to try civilian cases, including cases of common crime, should be examined.

46. The Working Group approved the working document and decided to ask Mr. Joinet to submit at its next session an interim report under item 6 of the provisional agenda. The final report, taking into account the suggestions made by the participants, should be submitted in 2002. It could eventually be submitted to the Sub-Commission at its fifty-fourth session for consideration.

2. The domestic implementation in practice of the obligation to provide effective domestic remedies

47. Ms. Hampson proposed to prepare a working paper on this subject, without financial implications, for the next session of the working group. A first report and then a final report would be submitted to the subsequent sessions of the working group, if the working group so decided. In her view, the working paper could be seen as the practical complement to Mr. Fix-Zamudio's report.

48. In explaining the purpose of her working paper, she stated that where there was an effectively functioning investigative system and an independent judiciary, it was most unlikely that violations of human rights would be systematic and widespread. An effectively functioning domestic system for providing redress normally appeared to have a preventive effect and was one of the best safeguards against impunity. Although many countries had ratified international human rights treaties which had the status of law in the domestic legal order, and in most countries torture, arbitrary detention and arbitrary killings were prohibited by domestic law, they were all-too-common occurrences, as shown by the reports of special rapporteurs and working groups. Something was clearly going wrong with the implementation in practice of these standards and the study would try to determine what that was in terms of procedures and practices and what could be attributed to a lack of political will.

49. Ms. Hampson suggested that her examination could focus on the following:

(a) The law in place, with regard to such issues as torture, the grounds of detention, the start of detention, the length of permitted detention, safeguards to prevent ill-treatment of detainees, etc.;

(b) Domestic rules of evidence, with regard to uncorroborated confessions, the effect of an allegation that a confession was obtained as a result of torture, illegal searches, etc., to establish whether there were gaps in the law;

(c) Matters of administrative practice, and administrative regulations with regard to the keeping of custody records, the different responsibilities of different officials within the security forces and the rights of detainees;

(d) The conduct of investigations at the scene, by means of forensic evidence, autopsies and post mortem, the number and level of training of police and gendarmes;

(e) The integrity of the judicial process, including issues such as anonymous witnesses, witness protection schemes, etc.;

(f) The role and status of the police and gendarmerie, and of public prosecutors and judges, including their pay, status, and the way in which they were viewed by the local population; it would be interesting to know if there was a correlation between the effectiveness of remedies and the low status of judges;

(g) The mechanism for pursuing complaints against State authorities, including the procedure, the way in which evidence was obtained, how the mechanisms worked in practice, whether procedures were different where a state of emergency had been declared.

50. Ms. Hampson suggested that evidence should be gathered by an examination of the relevant rules both of human rights treaty law and United Nations soft law, in particular through an examination of the reports of the Human Rights Committee and relevant general comments, the reports of the relevant special rapporteurs and working groups and case-law of other independent human rights mechanisms, such as the regional commissions and courts of human rights.

51. She also emphasized that the object of such a study would not be to point the finger at particular countries. The idea was to identify evidence of good practice which tended to ensure that domestic remedies worked effectively and evidence of practices that tended to lead in practice to impunity. States and NGOs would be invited to submit any information on good and bad practices which they wished to bring to the attention of the working group.

52. The function of the study would be to see whether there were administrative practices and habits that obstructed the effective functioning of domestic remedies and whether that was a matter of resources or a question of training. In the latter two cases the international community could be asked to assist. She re-emphasized that the goal would be to try to discover where, in the experience of all the human rights bodies, problems were occurring and to provide a tool to assist those bodies, when dealing with a particular State, to determine the nature of the problem.

53. The working group agreed on the text of a draft resolution to the Sub-Commission asking the Economic and Social Council for a two-day pre-sessional meeting of the working group.

IV. PROVISIONAL AGENDA FOR THE NEXT SESSION

54. At the moment of the adoption of the report, Ms. Zerrougui accepted the request of the working group to prepare a working paper on discrimination in the criminal justice system for the next session of the working group. The working group agreed upon the following draft agenda for its next session:

1. Election of officers.

2. Adoption of the agenda.

3. Issues related to the deprivation of the right to life, with special reference to:

(a) Imposition of the death penalty;

(b) Summary, arbitrary and extrajudicial executions.

4. Privatization of prisons: annually updated report.

5. Improvement and efficiency of the judicial instruments for the protection of human rights at the national level and their impact at the international level.

6. Administration of justice through military tribunals and other exceptional jurisdictions.

7. The domestic implementation in practice of the obligation to provide domestic remedies.

8. Discrimination in the criminal justice system.

9. Provisional agenda for the next session.

10. Adoption of the report of the working group to the Sub-Commission.

V. ADOPTION OF THE REPORT OF THE WORKING GROUP TO THE SUB-COMMISSION

55. At its third meeting, on 14 August 2000, the working group unanimously adopted the present report to the Sub-Commission.